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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN VO,

Defendant and Appellant.

E048205

(Super.Ct.No. RIF136840)

OPINION

APPEAL from the Superior Court of Riverside County. Michele D. Levine,
Judge. Affirmed with directions.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton, and
Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

On October 3, 2007, the Riverside County District Attorney's office filed an information charging defendant and appellant Martin Vo and codefendant Scotlay Sirithongdy with two counts of assault with a deadly weapon on Christopher Leeper and Steven DeMoss under Penal Code section 245 (counts 1 and 2); driving under the influence under Vehicle Code section 23152, subdivision (a) (count 3); and driving with a blood alcohol level of 0.08 or higher under Vehicle Code section 23152, subdivision (b) (count 4). The information also alleged that defendant personally inflicted great bodily injury upon Leeper under Penal Code section 12022.7, subdivision (a).¹

On June 13, 2008, the trial court granted defendant's motion to dismiss counts 3 and 4 under section 995. On July 22, 2008, the jury found defendant guilty of counts 1 and 2. The jury also found the enhancement for personal infliction of great bodily injury true.

On April 17, 2009, the trial court sentenced defendant to one year in jail, and five years probation.

On appeal, defendant contends that (1) the trial court abused its discretion when it denied defendant's motion to reduce his convictions to misdemeanors; and (2) the minute order from his sentencing hearing incorrectly indicates that the court ordered a parole revocation fine, rather than a probation revocation fine. For the reasons set forth below,

¹ All statutory references are to the Penal Code unless otherwise specified.

we shall order the minute order be modified. In all other respects, we shall affirm the judgment.

II

FACTUAL AND PROCEDURAL HISTORY

A. Prosecution Evidence

In the evening of May 15, 2007, defendant, his sister Linda, codefendant Sirithongdy and others were playing foosball at Bahama Mama's, a sports bar in Moreno Valley. The victims and Daniel Hawkins were also at the bar that night. Leeper and Hawkins played three competitive foosball games against defendant and his friend while DeMoss watched. The men placed a bet on the last game. They agreed that the loser would buy a pitcher of beer.

Defendant and his friend lost the game. Leeper and Hawkins offered to pay for the beer anyway, but defendant insisted on buying the beer. Defendant put his arm around Hawkins and led him to the bar where defendant paid for a pitcher of beer. Defendant left Hawkins behind and returned to the foosball area. Leeper had remained in the area; he was shaking hands with Sirithongdy.

Sirithongdy picked up a cue ball. Defendant approached Sirithongdy and they spoke briefly; the two bumped fists and defendant walked away. Defendant took off his Reggie Bush New Orleans Saints football jersey and placed it aside. Defendant was then only wearing a black tank top. While Leeper was sitting on a stool watching television,

Sirithongdy approached from behind and hit Leeper in the head with the cue ball. Leeper fell over and caught himself on a pool table. Sirithongdy hit Leeper on the head again.

DeMoss hurried towards Leeper and got between Leeper and Sirithongdy. Defendant picked up a pool stick and hit DeMoss across the face with it. The blow struck DeMoss on the left cheekbone. Other individuals joined in the brawl. They were punching, kicking and using pool sticks. Defendant struck DeMoss and Leeper multiple times with the pool stick.

Brian Cummins, the head of security at the sports bar, responded to the fight. Cummins approached defendant, who was holding a pool stick, and told him to calm down. The brawl was videotaped by the surveillance system. It was played for the jury in two formats—one fast motion version and one frame-by-frame point version.

As the fight broke up, defendant ran out of the bar. He and his sister got into a white Mercedes and drove away. Deputies Moline and Davis responded to the scene. They were told that one of the participants in the brawl was fleeing in a white Mercedes. The deputies pursued defendant and pulled defendant's car over. They found a Reggie Bush football jersey in the center console area. Defendant admitted that the jersey belonged to him and that he had been wearing it at Bahama Mama's. The deputies brought defendant back to the bar where Leeper and an employee identified defendant during an in-field lineup.

Defendant was arrested and interviewed. Defendant stated that he made a bet with Leeper while playing foosball that the loser would buy a pitcher of beer. He bought

Leeper the beer. As he was returning from the bar, an unknown person approached him and said that Leeper was trying to pick up on defendant's sister. Defendant became angry and picked up a pool stick. Defendant admitted hitting Leeper an unknown number of times with the pool stick.

Deputy Moline also interviewed defendant's sister, Linda. Linda stated that her brother was involved in an altercation at Bahama Mama's. She claimed that defendant was protecting her. She admitted that defendant hit two people with a pool stick. She tried to stop him. She identified Sirithongdy as the one who hit Leeper in the head with the cue ball. Linda later told police that she did not want to testify because she was afraid of her brother and Sirithongdy.

The deputies recovered the cue ball from Bahama Mama's; it had blood on it. They also recovered broken pool sticks; one stick had blood on it.

Sirithongdy was arrested days later and interviewed. He claimed that the victims were "talking shit" about winning at foosball and he was tired of it. The victims wanted to make another bet that involved defendant's sister. Sirithongdy admitted hitting Leeper with a cue ball twice. He claimed that he used the cue ball so he would not break his own hand.

Leeper sustained a large laceration to his scalp. The laceration required 16 staples. He also had sore gums, two loose teeth, a black eye, and multiple bruises to his body. DeMoss sustained a one-inch gash on his left cheek, a black right eye, and a fracture to his right cheekbone.

B. Defense Evidence

Defendant testified that he only knew Sirithongdy casually from the bowling alley. On the evening of the incident, he and his sister were bowling when they ran into Sirithongdy. Sirithongdy was with several friends. They all decided to go across the street to Bahama Mama's.

They played foosball at the bar against Leeper and Hawkins. There was a bet over a pitcher of beer on the third game. Defendant lost the game and went to the bar with Hawkins to buy the beer. As he returned from the bar, someone mentioned that his sister was being hit on. Defendant was not angry. When he got back, Sirithongdy was speaking with Leeper. Defendant wanted to tell Sirithongdy that he had purchased the beer. Because it was hot, defendant took off his football jersey. Defendant told Sirithongdy that he was going to get more quarters from the bartender so they could continue to play foosball. They exchanged a fist bump and then defendant walked off.

Defendant heard some commotion from behind him and turned around. He saw DeMoss running at Sirithongdy. DeMoss had his hand cocked and it appeared to defendant that DeMoss was going to punch Sirithongdy. Defendant claimed he never saw Sirithongdy with a cue ball in his hand and never saw Sirithongdy hit Leeper. Defendant grabbed a pool stick and "waved" it in front of DeMoss in a vertical motion to stop him from punching Sirithongdy. Because the first motion did not get DeMoss's attention, defendant waved the pool stick a second time. Defendant claimed that he did not hit DeMoss with either wave of the pool stick.

Defendant claimed that an unknown person came up and hit DeMoss with a pool stick. Defendant backed away. He was worried about his sister's safety. He saw two people beating DeMoss and tried to get them off by "tapping" them with a pool stick on the leg. A security guard approached and he stood with the guard until the fight ended and everyone scattered. Defendant ran out of the bar with his sister and drove away. Defendant claimed that he never punched or kicked anyone during the brawl.

III

DISCUSSION

A. The Trial Court Did Not Abuse Its Discretion in Denying Defendant's Motion to Reduce his Convictions to Misdemeanors

Defendant contends that the trial court abused its discretion in denying his request to reduce counts 1 and 2 to misdemeanors under section 17, subdivision (b).

1. Background Facts

Under section 17, subdivision (b), defendant moved to reduce both his assault with a deadly weapon convictions to misdemeanors. In denying the motion, the trial court stated as follows:

"I understand why the motion was made. I think it's more akin to circumstances in mitigation and lends itself more to circumstances in mitigation than it does to this event being characterized as anything other than a felony.

“I have reviewed my notes with respect to the testimony that was elicited, but I remember very much the -- the nature of the injuries that were sustained, and quite frankly, how much more serious they could have been given the nature of what occurred.

“What started out as simply a friendly game of foosball turned in to just an absolute nightmare for all of those concerned, but I have considered all aspects of the events that took place as well as the nature of this offense as compared to others, the nature of the injuries that were sustained, and the actions of [defendant].

“Based on all of the above, the Court will not exercise its discretion under Penal Code section 17(b) and will not reduce the matter to a -- actually, the assault with a deadly weapon as well as convicted in Count 1, and then with respect to the enhancement and Count 2 as well, the Court will not reduce those to misdemeanors at this time. So that motion is denied”

2. Standard of Review

Assault with a deadly weapon is a so-called “wobbler” offense. (§ 245, subd. (a)(1); *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974-975.) A trial court’s discretion to reduce a felony conviction to a misdemeanor for sentencing purposes is limited. “The determination to reduce a wobbler under section 17(b) ‘can be properly made only when the sentencing court focuses on considerations that are pertinent to the specific defendant being sentenced’ [Citations.]” (*People v. Superior Court (Alvarez)*, *supra*, at p. 980.) These include the defendant’s criminal history as well as “the nature and circumstances of the [current] offense, the defendant’s appreciation of

and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.’ [Citations.]” (*Id.* at p. 978.) On appeal, we review the trial court’s determinations not to reduce a wobbler to a misdemeanor for an abuse of discretion. (*Id.* at pp. 977-978.)

3. Analysis

In this case, defendant has failed to demonstrate that the trial court’s decision to deny his motion under section 17, subdivision (b) was irrational or arbitrary. A review of the record shows that the trial court’s sentencing decision was based on the violent nature of the crime, the serious injuries inflicted on the victims, and defendant’s attitude toward the offense. We discern no abuse of discretion.

First, the record demonstrates that defendant participated in a violent attack on two victims with a pool stick simply because the victims beat him in a game of foosball. The victims were unarmed, did not provoke the attack and did not fight back.

Notwithstanding, defendant repeatedly struck both Leeper and DeMoss in the face and body with a pool stick while the victims were also being beaten by numerous other individuals. As the trial court noted during sentencing, defendant’s actions were “incredibly violent.”

Moreover, defendant engaged in planning prior to the attack on the victims. He and the codefendant spoke, while the codefendant was holding the cue ball, just prior to the attack. Then, before joining in the group beating, defendant took his football jersey off and retrieved a pool stick as his weapon.

As a result of the attacks, both victims sustained serious injuries. Leeper had a large cut on his scalp that required 16 staples. He also sustained sore gums, loose teeth, a black eye, and bruising to his body. DeMoss sustained a gash to his cheek, a black eye, and a fractured cheek. The trial court noted that the victims could have suffered much more severe injuries because of the serious and violent nature of the attack.

Furthermore, defendant never took responsibility for his actions. He testified that he merely waved the pool stick up and down in order to protect himself and Sirithongdy, but never struck anyone. Defendant claimed that it was an unknown person who was beating the victims with the pool stick. Defendant repeated this story to the probation officer when he was interviewed after conviction. During sentencing, the trial court took into account that defendant was not truthful about what had actually occurred the night of the incident.

In sum, all of these factors—the violent nature of the attack, the serious injuries inflicted on both victims, and defendant’s unwillingness to take responsibility for his actions—support the trial court’s decision to deny defendant’s section 17, subdivision (b) motion.

Nevertheless, defendant contends that the trial court’s decision was unreasonable because he did not have a prior criminal record. Although this factor weighed in defendant’s favor, all the other factors discussed above weighed against him. The trial court recognized that defendant lacked a criminal record; at sentencing, the court elected to sentence defendant to local time as opposed to state prison.

Based on the above, we discern no abuse of discretion in the trial court's decision to deny defendant's section 17, subdivision (b) motion.

B. The Minute Order Should Be Amended

Defendant contends that the minute order from his sentencing incorrectly indicates that the trial court ordered a parole revocation fine, instead of a probation revocation fine. The People agree.

Here, as a condition of defendant's probation, the trial court ordered:

"You're also to pay an additional \$400 for a probation revocation restitution fine. That's pursuant to 1202.44 of the Penal Code, but that fine is stayed, and the stay will remain permanent so long as you complete probation. If you otherwise have probation revoked, that stay will be lifted, and the fine will be imposed."

However, the minute order states: "Pay additional Parole Revocation restitution fine in the amount of \$400.00 pursuant to 1202.4(B) PC fine is suspended unless parole is revoked."

We agree with the parties that the minute order should be amended to reflect that the trial court ordered and stayed a probation revocation restitution fine under section 1202.44, *not* a parole revocation fine. (See *People v. Zackery* (2007) 147 Cal.App.4th 380, 388 [minute order should be amended to reflect oral pronouncement of judgment].)

IV

DISPOSITION

The trial court is directed to amend its April 17, 2009 minute order to reflect that a probation revocation restitution fine was imposed under section 1202.44 and to strike any reference to parole. In all other respects, the judgment is affirmed.

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/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ Miller
J.